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BRIEF FOR RESPONDENT IN OPPOSITION

IN THE

Supreme Court of the United States

OCTOBER TERM, 1971

No. 71-872

JACK I. JOHNSON

and

HERBERT W. PAXTON, JR.,
Petitioners,

v.

BOARD OF APPEALS AND REVIEW,
Respondent.

On Petition For A Writ Of Certiorari
To The District Of Columbia
Court Of Appeals

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QUESTIONS PRESENTED

1. Did not petitioners' failure to file a petition for a writ of certiorari within 90 days after the entry of the judgment below deprive the Court of jurisdiction to entertain the petition?

2. Should this Court exercise its jurisdiction to review by writ of certiorari a decision involving the construction of statutes, of purely local application and significance,

relating to police and firemen retirement procedures and standards of judicial review of decisions of District of Columbia administrative agencies?

COUNTER-STATEMENT OF THE CASE

Petitioners, former members of the United States Park Police, after hearings before the District of Columbia Police and Firemen's Retirement and Relief Board [1] (hereinafter "the Retirement Board"), were ordered retired, pursuant to D. C. Code, 1967, § 4-526, for non-service-connected disability. Contending that they were entitled to retirement, pursuant to D. C. Code, 1967, § 4-527, for service-connected disability, petitioners appealed to the District of Columbia Board of Appeals and Review,[2] which sustained the action of the Retirement Board. Petitioners then appealed the orders of the Board of Appeals and Review to the District of Columbia Court of Appeals pursuant to the provisions of the District of Columbia Administrative Procedure Act, D. C. Code, Supp. IV, 1971, § 1-1501 et seq. That court, on October 6, 1971, affirmed the orders of the Board of Appeals and Review. (A. 1a, 10a.)

At the proceedings before the Retirement Board and the Board of Appeals and Review, it was undisputed that both petitioners were mentally unfit for police duty. Petitioner Johnson's condition was characterized as a "passive aggressive personality with paranoid overtones"; petitioner Paxton's condition was described as "severe neurosis with

[1] The District of Columbia Police and Firemen's Retirement and Relief Board is an agency of the District of Columbia government created by executive order of the Commissioner of the District of Columbia. See Organization Order No. 12; D. C. Code, Supp. IV, 1971, Title 1, Administration, Appendix, p. 75.

[2] The District of Columbia Board of Appeals and Review is an administrative review board established by executive order of the Commissioner of the District of Columbia. See Organization Order No. 112, D. C. Code, Supp. IV, 1971, Title 1, Administration, Appendix, p. 87.

features of tensions, anxiety and depression" (A. 6a). Neither petitioner contended below that his basic mental disorder was incurred in the performance of duty. Rather, they contended that their police duty aggravated their mental disorders to such an extent that they could no longer perform duty (A. 6a). In affirming the orders of the Retirement Board and the Board of Appeals and Review, the District of Columbia Court of Appeals stated:

> "* * * We think it was within the competence of the Retirement Board to conclude that * * * emotional resentments to such normal incidents as reprimands, assignments to riot duty, policy decisions of superior officers on prosecution, and the like * * * were merely symptoms of a disease rather than products of aggravating causes." (A. 9a.)

Citing the District of Columbia Administrative Procedure Act, D. C. Code, Supp. IV, 1971, § 1-1501 et seq., the court further ruled that the applicable standard of review of decisions of the Retirement Board and the Board of Appeals and Review is not whether one party or the other had sustained its burden of proof, but whether there is substantial evidence in the record supporting the administrative ruling. Finding that there was such evidence in the records of the administrative proceedings, the court affirmed. (A. 9a.)

REASONS WHY THE WRIT SHOULD BE DENIED

The Court lacks jurisdiction to entertain the petition because it was not timely filed.

The Court does not have jurisdiction to entertain the petition for writ of certiorari filed herein because petitioners have not complied with the statutory command requiring them to apply for a writ of certiorari "...within ninety

days after the entry of ... judgment . . ." See 28 U. S. C. § 2101(c) and cf. *Schacht* v. *United States*, 398 U. S. 58, 64 (1970). The judgments below were entered on October 6, 1971 (A. 1a).[3] The petition for writ of certiorari, however, was not filed until Wednesday, January 5, 1972, which was the *ninety-first* day after entry of judgment.

On October 29, 1971, petitioners did file in the court below a motion for leave to file; time having expired,[4] and for an extension of time within which to file, a petition for rehearing or rehearing *en banc*. The motion was denied. It is well settled that the filing of such a motion, when it is denied, cannot operate to extend the time for petitioning this Court for a writ of certiorari. *Morse* v. *United States*, 270 U. S. 151 (1926); *Gypsy Oil Company* v. *Escoe*, 275 U. S. 498 (1927); *Bowman* v. *Loperena*, 311 U. S. 262, 266 (1940).

Assuming the Court has jurisdiction, petitioners have failed to present any substantial federal question warranting review on writ of certiorari.

Contrary to the command of subparagraph (h) of paragraph 1 of the Court's Rule 23, the petition for a writ of certiorari does not contain "[a] direct and concise argument amplifying the reasons relied on for the allowance of the writ." Indeed, petitioners nowhere indicate which, if any, of the "special and important reasons" set forth in Rule 19 they believe justify the granting of the petition. Rather, the petition is directed to what petitioners con-

[3] Rule 36 of the Rules of the District of Columbia Court of Appeals provides, in pertinent part:

> "(a) *Preparation and Entry.* The notation of a judgment in the docket constitutes entry of the judgment. The clerk shall prepare, sign and enter the judgment immediately following receipt of the opinion of the court . . ."

[4] Rule 40(a) of the Rules of the District of Columbia Court of Appeals provides, in pertinent part:

> ". . . A petition for rehearing or rehearing in banc may be filed within fourteen days after entry of judgment unless the time is shortened or enlarged by order . . ."

ceived to be the merits of issues presented to the court below and unanimously resolved against them.

The record does not disclose any ground for review conceivably falling within the standards and considerations governing review on writ of certiorari prescribed by Rule 19 of the Rules of this Court. These cases involve nothing more than the construction of District of Columbia statutes, of purely local application and significance, relating to police and firemen retirement procedures and to standards of judicial review of decisions of District of Columbia administrative agencies.

The Court has made it clear on many occasions that, where, as here, it is confronted with a petition for a writ of certiorari involving nothing more than a matter of purely local significance, it will not, absent a clear showing of egregious error, exercise its jurisdiction. *Del Vecchio* v. *Bowers*, 296 U. S. 280, 285 (1935); *District of Columbia* v. *Pace*, 320 U. S. 698, 702 (1944); *Busby* v. *Electric Utilities Union*, 323 U. S. 72, 74-75 (1944); *Fisher* v. *United States*, 328 U. S. 463, 476-477 (1946); *Griffin* v. *United States*, 336 U. S. 704, 717-718 (1949), rehearing denied, 337 U. S. 921 (1949). There has been no showing of egregious error here.

In declining to hold that, in the circumstances of these cases, D. C. Code, 1967, § 4-527(2), imposes upon the government the burden of proving a lack of connection between petitioners' disability and the performance of duty, the court relied upon the plain language of the statute that a claimant is entitled to be retired at the higher rate only if his injury or disease "[is] *shown* to have been aggravated by the performance of duty *to such an extent* that the member is permanently disabled for the performance of duty * * *" (A. 7a).

In contending that the court below erred in this regard, petitioners rely on a statement in a House Report on the bill, which, when enacted, was codified as D. C. Code, 1967, § 4-527(2), which they construe as indicating an intention

that the government was to bear the burden of proof in cases such as this. See H. R. Rept. No. 892, 87th Cong., 1st Sess. 1 (1961). Yet the Senate Report, while otherwise quite similar to the House Report, omits any reference to burden of proof. See S. Rept. No. 2271, 87th Cong., 2nd Sess. (1962). In view of the clear language in the statute, it can hardly be said that the District of Columbia Court of Appeals committed egregious error in interpreting the statute as it did. See *Davidson* v. *Gardner*, 370 F. 2d 803, 828 (6th Cir., 1967); *Abell* v. *Spencer*, 96 U. S App. D. C. 268, 225 F. 2d 568 (1955); and 2 Sutherland, *Statutory Construction*, § 5005 (3rd ed., 1943).

Petitioners further contend that the ruling of the court below is in conflict with the rulings of the United States Court of Appeals for the District of Columbia Circuit in *Blohm* v. *Tobriner*, 122 U. S. App. D. C. 2, 350 F. 2d 785 (1965), and in *Wingo* v. *Washington*, 129 U. S. App. D. C. 410, 395 F. 2d 633 (1968). However, the court's opinion in the *Blohm* case could not have been applicable to subsection 2 of D. C. Code, 1967, § 4-527, because the police officer involved in that case was retired before that subsection was added to the statute (A. 8a). And in *Wingo* v. *Washington*, *supra*, the court neither identified the subsection of the statute under which the appellant therein sought to be retired nor confronted the problem of the different language used in the two subsections. Moreover, the only *holding* in *Wingo* was that the administrative findings were insufficiently articulated and were not, therefore, susceptible of intelligent review. Thus, the court's statement regarding "presumptions of line-of-duty disability" (129 U. S. App. D. C. at 412, 395 F. 2d at 365) is, at best, dicta.

In any event, the test spoken of by the court in *Blohm* and *Wingo*, that evidence of lack of connection between disability and performance of duty "should clearly preponderate and be substantial and persuasive" (see *Wingo* v. *Washington*, 129 U. S. App. D. C. at 412, 395 F. 2d at 635),

has been legislatively overruled by the District of Columbia Administrative Procedure Act, D. C. Code, Supp. IV, 1971, § 1-1501 et seq. The Act supersedes "any * * * procedure to the extent of any conflict therewith" (D. C. Code, Supp. IV, 1971, § 1-1501), and provides that in reviewing agency decisions on evidentiary grounds the test is whether the administrative ruling is "supported by substantial evidence in the record of the proceedings before the court" (D. C. Code, Supp. IV, 1971, § 1-1510).

In no sense then can this case be viewed as presenting a question of a magnitude sufficient to warrant the exercise of this Court's jurisdiction to review on writ of certiorari, assuming such jurisdiction exists.

CONCLUSION

Upon the foregoing, it is respectfully submitted that the petition for writ of certiorari should be dismissed or, in the alternative, denied.

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